(2)

No. 07-657

FILED

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IN THE

Supreme Court of the United States

ROBERT J. CAMPBELL,

Petitioner,

v.

TOWN OF WEYMOUTH, MASSACHUSETTS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS TOWN OF WEYMOUTH, MASSACHUSETTS, *et al.*

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the First Circuit's Judgment dismissing the Petitioner's Second Amended Complaint is in conflict with the decision of another United States court of appeals on the same important matter.

2. Whether the United States Court of Appeals for the First Circuit's Judgment dismissing the Petitioner's Second Amended Complaint has importance to the operation of our federal system which warrants further review.

PARTIES TO THE PROCEEDING

The petition does not accurately list the parties to the proceeding. Purported petitioner The Campbell Family Investment Trust was dismissed by the United States District Court by Order dated October 14, 2005 and did not appeal its dismissal. Additionally, the Petitioner voluntarily dismissed his claim against purported respondent Stanley Elkerton by document filed in the District Court on March 13, 2006.

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STATEMENT OF THE FACTS

The Second Amended Complaint, Docket No. 12 ("Complaint") alleged that the Town of Weymouth, Massachusetts and certain of its present and former employees, and two individuals are liable to Plaintiff-Petitioner Robert Campbell ("Petitioner") under federal law for a series of alleged events beginning in October 1995, in relation to an undeveloped lot at 311 Neck Street, Weymouth, Massachusetts ("the lot"). The lot is in a Residential R-1 zoning district, and is in a flood plain overlay district classified by FEMA as a Flood Hazard Zone A4. *Id.*, para. 27. The Petitioner alleges that in October 1995 he or The Campbell Family Investment Trust ("Campbell Trust") made a deposit of $8,500 on 2 lots, one of which is the lot at issue. *Id.*, para. 23. The lot was not purchased until April 4, 1997, when it passed by deed to Campbell Trust. *Id.*, para. 74. The Petitioner is not a Trustee of Campbell Trust. Campbell Trust is not a party on appeal.

The Petitioner hoped to build a childcare facility on the lot. Complaint, paras. 22, 24. In order to construct a building on the lot of the size and dimensions desired by the Petitioner in 1996, the Petitioner needed to obtain a building permit from Weymouth, and a special permit from the Weymouth Planning Board ("Planning Board"). The Petitioner's contractor submitted an application for a special permit to the Planning Board in November 1996. *Id.*, para. 41. At a public hearing on February 24, 1997 the Planning Board voted to deny the Petitioner's application for a special permit. *Id.*, para. 67.

The Petitioner alleged that from May 1996 to January 1997, the Planning Board proposed changes to

zoning bylaws which increased minimum lot size and width in all R-1 zoned areas, increased parking space requirements for all commercial establishments and set minimum parking space requirements for day care centers. *Id.*, para. 43. These bylaw changes were allegedly put on the Town Meeting Warrant in January 1997, and approved at Town Meeting in May 1997, and became effective in August 1997. *Id.*, para. 44.

The Petitioner alleges that the Planning Board subsequently proposed additional zoning bylaw changes for Residential R-1 zoning districts which required an increased number of parking spaces, which changes were put on the Town Meeting Warrant in January 1998, approved at Town Meeting in May 1998, and became effective in August 1998. *Id.*, paras. 80-81.

Following successful appeal of Campbell's denial to the Massachusetts Land Court, as permitted by Massachusetts law, *see* M.G.L. c. 40A, § 17, the Planning Board issued a special permit for the lot in November 1998. *Id.*, para. 94. The special permit expired in November 2000, two years later. *Id.*, para. 124. Petitioner did not apply for a building permit until November 2000. *Id.*, para. 124. The Petitioner still had not begun construction when his building permit expired in May 2001. *Id.*, para. 134.

On or about December 28, 2001, the Petitioner applied to the Weymouth Board of Zoning Appeals ("BZA") for a special permit and a variance of the zoning bylaws to excuse compliance with the minimum parking and setback requirements for his proposed childcare facility. *Id.*, para. 140. The Petitioner was present at a

public hearing before the BZA on February 6, 2002, and he argued in support of his application for a special permit and for a variance. *Id.*, para. 142. He was present when the BZA denied his request for a variance of the minimum parking space requirement, but approved his application for a special permit to build within the flood plain. *See id.*, para. 144. The BZA's decision was also communicated to him in written form on March 14, 2002. *Id.*, para. 155. The Petitioner appealed the BZA's denial of his request for variance to the Massachusetts Land Court. That action is still pending.

The Petitioner filed his lawsuit in the U.S. District Court for the District of Massachusetts on March 14, 2005. The District Court afforded the Petitioner several failed attempts to plead a viable claim under federal law, culminating in the filing of his Second Amended Complaint ("Complaint"). The Petitioner's Complaint purported to allege liability under 42 U.S.C. §§ 1983, 1985 and 1986 based on alleged deprivation of his "rights to due process given by {the Fifth Amendment of} the Constitution of the United States" and/or an alleged deprivation of his "rights to freedom from {oppression} given by the Constitution of the United States." *Id.*, paras. 211-215. The District Court allowed the Respondents' motions to dismiss and dismissed all counts of the Complaint with prejudice, except for the conspiracy count, which the District Court dismissed without prejudice.

SUMMARY OF THE ARGUMENT

The Court should reject the Petition For A Writ Of Certiorari because it does not state any compelling reason for certiorari review. Notwithstanding of the Petitioner's evident assertion that the decision of the United States Court of Appeals for the First Circuit ("Circuit Court") affirming dismissal is in conflict with the decisions of one or more other United States courts of appeal on an important matter, his petition fails utterly to demonstrate that this is so. The petition cites no authority in any other United States court of appeal that conflicts with the Circuit Court's application of well settled principles of Due Process jurisprudence to find no actionable deprivation of Due Process pled in the Complaint. Accordingly, the Court should exercise its discretion and deny certiorari review.

REASONS FOR DENYING THE PETITION

I. The Petition Does Not Demonstrate That The Court Of Appeals Decision Is In Conflict With The Decision Of Another United States Court Of Appeals On The Same Important Matter.

Although the Petitioner asserts that the decision of the United States Court of Appeals for the First Circuit ("Circuit Court") affirming dismissal is in conflict with the decisions of one or more other United States courts of appeal on an important matter, and so review certiorari is warranted, his petition fails utterly to demonstrate that this is so. Because the petition does not demonstrate that the Circuit Court's Judgment is in conflict with the decision(s) of one or more other United States courts of appeal on an important matter, the Court should deny the petition.

The petition presents as a question for review

> Whether the Judgment of the United States Court of Appeals for the First Circuit is consistent with the decisions of the other Courts of Appeals on Fourteenth Amendment Due Process claims relying on the guidelines defined by the Supreme Court in *Williamson County Commissioners v. Hamilton Bank*, 473 U.S. 172 (1985).

Petition, p. *i*. No other question presented by the Petitioner states a basis for granting certiorari review. The premise on which the Petitioner relies from *Williamson County Commissioners* is that

> government regulation does not effect a taking for which the Fifth Amendment requires just compensation; instead, regulation that goes so far that it has the same effect as a taking by eminent domain is an invalid exercise of the police power, violative of the Due Process Clause of the Fourteenth Amendment.

Petition, p. 13, *quoting Williamson County Commissioners*, 473 U.S. 172 (1985). The Circuit Court decision at issue manifests neither any disagreement with nor any inconsistent application of that general tenet cited by the Petitioner.

The Circuit Court affirmed the District Court's decision dismissing the Petitioner's Complaint based on well settled and unchallenged tenets of Fourteenth Amendment Due Process jurisprudence. Because

42 U.S.C. § 1983 does not create substantive rights, but provides a vehicle for the protection and vindication of rights secured by the United States Constitution or by federal law, the Petitioner must plead that the Respondents deprived him of a constitutional or federally-protected right. 42 U.S.C. § 1983; *Baker v. McCollan*, 443 U.S. 137, 146 n.3, 99 S. Ct. 2689, 2694 n.3, 61 L. Ed. 2d 433 (1979). The Complaint asserted a purported deprivation of the Petitioner's right to Due Process of law as provided by the Fifth Amendment to the United States Constitution.

The Due Process Clause of the Fourteenth Amendment prohibits a state from depriving a person of "life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. This guarantee has both substantive and procedural components. Procedural due process guarantees that a state proceeding which results in a deprivation of property is fair, while substantive due process ensures that such state action is not arbitrary and capricious. *Licari v. Ferruzzi*, 22 F.3d 344, 347 (1st Cir. 1994). "When a procedural due process claim is advanced, the proper focus must be on the manner in which the state has acted: 'how and when' the alleged deprivation was effected." *Amsden v. Moran*, 904 F.2d 748, 753-754 (1st Cir.) *cert. denied*, 498 U.S. 1041, 111 S. Ct. 713, 112 L. Ed. 2d 702 (1991). Conversely, "a substantive due process inquiry focuses on 'what' the government has done, as opposed to 'how and when' the government did it." *Id.* The Complaint does not specify whether the alleged deprivation of Due Process was substantive or procedural in nature and so the District Court addressed both possibilities in its Memorandum and Order. The Circuit Court likewise addressed both aspects of Due Process in its Judgment affirming dismissal.

The authority cited in the Circuit Court's Judgment affirming dismissal is neither unsettled nor controversial. The petition identifies no decision of any other United States Court of Appeals that is inconsistent with the reasoning or result of the Circuit Court's review of the Petitioner's Complaint. The Circuit Court found no deprivation of substantive Due Process in the Zoning Board of Appeals' denial of the Petitioner's request for a variance because the conduct alleged did not rise to the level of an abuse of government power that shocks the conscience or action that is legally irrational in that it is not keyed to any legitimate state interests. The Court has warned that courts should be "reluctant to expand the concept of substantive due process." *Pagan v. Calderon*, 448 F.3d 16, 33 (1st Cir. 2006). In keeping with this admonition, the First Circuit has "left the door slightly ajar for . . . 'truly horrendous situations,'" but "any permit or license denial, no matter how unattractive, that falls short of being 'truly horrendous' is unlikely to qualify as conscience-shocking." *Id.* The Circuit Court determined, correctly, that the denial of the Petitioner's request for variance falls short of the "truly horrendous" circumstances necessary to qualify as conscience-shocking.

The Circuit Court's disposition of the Petitioner's purported procedural Due Process claim relied on precedent that was equally well settled and noncontroversial. To establish a procedural due process claim under 42 U.S.C. § 1983, the Petitioner was required to allege that the Respondents, acting under color of state law, deprived him of a property interest without constitutionally adequate process. *Logan v. Zimmerman*

Brush Co., 455 U.S. 422, 428, 102 S. Ct. 1148, 1153, 71 L. Ed. 2d 265 (1982). "The basic purport of the constitutional requirement is that, before a significant deprivation of liberty or property takes place at the state's hands, the affected individual must be forewarned and afforded an opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d 62 (1965). A plaintiff alleging harm resulting from inadequate pre-deprivation procedures cannot obtain relief in federal court when adequate post-deprivation remedies exist under state law. *See Hudson v. Palmer*, 468 U.S. 517, 531-33, 104 S. Ct. 3194, 3202-03, 82 L. Ed. 2d 393 (1984).

The procedural constitutional violation actionable under § 1983 is "not complete" when the alleged deprivation occurs, but is complete only when the state fails to provide an adequate post deprivation remedy. *Zinermon v. Burch*, 494 U.S. 113, 126, 110 S. Ct. 975, 983, 108 L. Ed. 2d 100 (1990). When a procedural due process violation is alleged, the Court must "examine the procedural safeguards built into the statutory or administrative procedure ... effecting the deprivation and any remedies for erroneous deprivations provided by statute or tort." *Zinermon*, 494 U.S. at 126, 110 S. Ct. at 983.

The Circuit Court held, correctly, that Massachusetts law provides an adequate post-judgment remedy. Massachusetts law provides judicial review to "any person aggrieved by a decision of the (zoning) board of appeals or any special permit granting authority." *See* M.G.L. c. 40A, § 17. The state court can annul

a decision of a permit granting agency which exceeded the scope of its authority, and can award costs if the permit granting agency acted with "gross negligence, in bad faith or with malice." *Id.* The Petitioner has, in fact, filed a state court appeal challenging the BZA's denial of his application for variance. The Petitioner could also have pursued a civil damages claim under state law for inverse condemnation if he believed that such a claim was warranted. *See* M.G.L. c. 79 § 10. "That state law procedures may not allow one to recover 'the full amount that he might receive in a § 1983 action is not . . . determinative of the adequacy of the state remedies." *Hudson*, 468 U.S. at 535, 104 S. Ct. at 3204. "The failure of the Massachusetts statutory scheme to confer a more generous damages entitlement falls well within the range of constitutionally acceptable choices which the Commonwealth, in our federalist system, is allowed to make." *Chongris v. Board of Appeals of Town of Andover*, 811 F.2d 36, 45 (1st Cir.) Cert. Denied 483 U.S. 1021, 107 S. Ct. 3266, 97 L. Ed. 2d 765 (1987).

II. The Court Of Appeals' Decision Does Not Have Importance To The Operation Of Our Federal System Which Warrants Further Review.

The Court should deny the petition because the challenged decision lacks importance which extends beyond the parties to this litigation. Since the Court's ability to hear and devote attention and resources to cases having obvious and lasting significance to the operation of our nation's federal system would be compromised by allocation of the Court's resources to cases having importance only to the parties directly affected by their outcome, the Court should deny this petition.

Certiorari jurisdiction "is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 257-258, 36 S. Ct. 269, 271 (1916); *See Rogers v. Missouri Pac. R. Co.*, 352 U.S. 521, 531, 77 S. Ct. 459, 463 (1957) (Frankfurter, J., dissenting). Consideration of the present petition must be undertaken in view of "the volume and complexity of the cases (submitted to the Court for Petition For Writ of Certiorari) which obviously call for decision by this Court, and . . . the time and thought that the proper disposition of such cases demands." *Rogers*, 352 U.S. at 531, 77 S. Ct. at 463. The Court's power to control its docket, bestowed by Congress at the Court's request, "carries with it the responsibility of granting review only in cases that demand adjudication on the basis of importance to the operation of our federal system; importance of the outcome merely to the parties is not enough." *Id.* The Judgment in the present case holds no importance to the operation of our federal system, though the outcome of this case is obviously significant to the parties affected by the Judgment.

The Circuit Court's Judgment applied general rules of civil procedure and Due Process jurisprudence to facts unique and specific to alleged wrongdoing by the Respondents in relation to an arcane provision of state law. The Petitioner alleges in substance, and the Respondents deny, that the Respondents enacted zoning bylaws and denied his application for a variance of those bylaws in order to circumvent a provision of Massachusetts law designed to foster the establishment of childcare centers in residentially zoned areas. The Circuit Court's decision holds no novel application of federal law which may have broad application to persons who may govern their conduct by any rule set forth in this decision. Court action to interpret and rule on what is unquestionably a matter of state law of limited application would serve no lasting or transcendent purpose. The principles at issue require no amplification or repetition.

Since the Circuit Court's Judgment lacks lasting and transcendent importance to the operation of the federal system, the Respondents submit that further appellate review is not necessary or warranted in the present case.

CONCLUSION

Issuance of a Writ of Certiorari and further review of the Court of Appeals decision is unnecessary and would serve no useful purpose, since the Circuit Court's Judgment is not in conflict with the decisions of other United States Courts of Appeal on any important point. The issues in dispute are important only to the parties directly affected, and have no lasting or transcendent importance. Notwithstanding of the Petitioner's evident disappointment with the outcome of his lawsuit, the Circuit Court acted appropriately and within its authority in ruling that the Complaint failed to state a claim for which relief can be granted.

Respectfully submitted,

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Dated: December 19, 2007